United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Vanessa Mansel

Bankruptcy No. 98 B 30062 **Adversary No. 99 A 517**

Adversary Caption: Watson & Brown, P.C. and Daniel Williams, Jr., v. Vanessa Mansel

Date of Issuance: July 19, 2001

Judge: Ginsberg

Appearance of Counsel:

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Chapter 7
Vanessa Mansel,	)	
	)	No. 98 B 30062
Debtor.	)	
	)	Honorable Robert E. Ginsberg
	)	
Watson & Brown, P.C.	)	
and	)	
Daniel Williams, Jr.,	)	
	)	
Plaintiffs,	)	Adversary Proceeding
	)	
v.	)	No. 99 A 00517
	)	
Vanessa Mansel,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the ten motions filed by the Debtor, Vanessa Mansel ("Debtor"), to dismiss the amended complaint filed against her by Watson & Brown and Daniel Williams, Jr. (collectively "Plaintiffs" or individually "Plaintiff"). There is also one motion, also filed by the Debtor, to strike allegations that are allegedly immaterial, impertinent or incorrect. Plaintiffs' amended complaint

contains three counts and seeks to determine the dischargeability of certain debts under §523(a)(6)[1] of the Bankruptcy Code, 11 U.S.C. §523(a)(6). The plaintiffs also seek denial of the Debtor's discharge under §727(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. §727(a)(2)(A).[2]

The Debtor's first motion seeks to quash the summons and dismiss the amended complaint pursuant to Fed.R.Bankr.P. 7004(e).[3] The Debtor's second motion seeks to dismiss the amended adversary

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[1] Section 523(a)(6) of the Bankruptcy Code provides:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
> for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

[2] Section 727(a)(2)(A) of the Bankruptcy Code provides:

> The court shall grant the debtor a discharge, unless –
> the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –
> property of the debtor, within one year before the date of the filing of the petition[.]

[3] Bankruptcy Rule 7004(e) provides:

> **Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the

complaint pursuant to Fed.R.Civ.P. 4(m)[4], on the ground that the complaint and summons have not been properly served. Debtor's third motion is a motion to dismiss the amended complaint because this district is not the proper venue to hear this proceeding, pursuant to Fed.R.Civ.P. 12(b)(3).

The Debtor next seeks to dismiss the amended complaint pursuant to Fed.R.Civ.P. 12(b)(4) & (5), arguing that the alias summons and service of the amended complaint are inadequate. Debtor's fifth motion is to strike immaterial allegations from the amended complaint, pursuant to Fed.R.Civ.P. 12(f). The sixth motion seeks to dismiss the amended complaint under Fed.R.Civ.P. 10(b) because of the failure of the Plaintiffs to plead separate causes of action in separate counts. Debtor's seventh motion is brought under Fed.R.Civ.P. 12(b)(6) and seeks to dismiss Count I of the complaint, which seeks to determine the dischargeability of certain debts owed by the Debtor to Plaintiffs, pursuant to 11 U.S.C. §523(a)(6).

The Debtor next moves to dismiss Count I of the complaint because of Plaintiffs' alleged lack of standing. The Debtor's ninth motion is a motion pursuant to Fed.R.Civ.P. 12(b)(6), seeking to dismiss Count II of the amended complaint. Count II of the complaint objects to the granting of the Debtor's discharge under 11 U.S.C. §727(a)(2)(A). Finally, Debtor's tenth motion is brought pursuant to Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 8[5], and seeks to dismiss Count III of the amended complaint

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> summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

[4] The Federal Rules of Civil Procedure are, for the most part, made applicable to the proceedings by the Federal Rules of Bankruptcy Procedure. Fed. R. Civ. P. 4(m) is made applicable to this proceeding by Fed. R. Bankr. P. 7004(a).

[5] Fed. R. Civ. P. 8 sets forth the general rules of pleading.

which seeks to determine the dischargeability of certain debts owed to the Plaintiffs by the Debtor under 11 U.S.C. §523(a)(6). For the reasons stated below, the Court denies all of the Debtor's motions.

Facts

The Debtor and the Plaintiff, Daniel Williams, Jr. ("Williams"), are the parents of Ashanti Williams ("Ashanti"), who was born August 14, 1992. Although the Plaintiff and Williams were never married to each other, Williams executed an admission of paternity as to Ashanti in 1993, and at the same time consented to the entry of an order in the divorce court setting child support and visitation. At that time, Williams had overpaid his statutory child support and was due a credit. From 1993 until 1997, the Debtor regularly denied Williams visitation with Ashanti. On February 24, 1997, Williams filed a petition for rule to show cause against the Debtor for visitation abuse in the Circuit Court of Kane County. At the time, Plaintiff Watson & Brown ("W&B"), a law firm, represented him and continued to represent him throughout the subsequent litigation between Williams and the Debtor until W&B was dissolved on November 1, 1998.

During an appearance in the Illinois state court, the Debtor was advised by the state court judge as to her rights and obligations in the rule to show cause proceedings, including the penalties that might be imposed on her in the rule to show cause proceeding. Specifically, the judge informed her that if she were found to be in contempt of court for willfully violating the visitation order, she would be required to pay Williams' attorney's fees. The Debtor pursued the petition for rule to show cause by filing a motion to restrict visitation, alleging that Williams sexually abused Ashanti. A hearing was held on these issues beginning in October 1997 and ending in March 1998. On May 7, 1998, the divorce court issued an

order finding the Debtor in indirect civil contempt and denying her petition to restrict visitation. The state court found that there was insufficient evidence to conclude that Williams sexually abused Ashanti, and that the lawsuit was a part of a "systematic effort by the plaintiff [Debtor] to stifle the parent/child relationship of the Defendant [Williams]." Additionally, the divorce court held that the Debtor's conduct was willful.

In its order of May 7, 1998, the divorce court granted leave to Williams' attorney to file petitions seeking attorney's fees pursuant to 750 ILCS 5/508.[6] W&B filed a petition for attorney's fees on behalf of Williams, and, after a hearing, the court entered judgment in favor of W&B and against the Debtor in the amount of $19,553.09 for fees and $1,333.35 in expenses.

During the course of the domestic relations proceedings, the state court had appointed Lisa Nyuli ("Nyuli") Guardian ad Litem for Ashanti. Nyuli incurred $6,702.50 in attorney's fees during the litigation. The court, due to the Debtor's misrepresentations regarding her 401(K) account, allocated one-third of

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[6] 750 ILCS 5/508 provides in relevant part:

> The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own costs and attorney's fees and for the costs and attorney's fees necessarily incurred or, for the purpose of enabling a party lacking sufficient financial resources to obtain or retain legal representation, expected to be incurred by any party, which award shall be made in connection with the following: The maintenance or defense of any proceeding under this act. . . . In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without cause or justification, the court shall order the party against whom the proceeding is brought to pay the costs and reasonable attorney's fees of the prevailing party.

Nyuli's fees to Debtor and two-thirds to Williams. Williams filed a motion to reconsider in the state court which has never been heard due to the automatic stay.

After the May 7, 1998 order finding the Debtor in indirect civil contempt, the Debtor began taking steps to interfere with Williams' ability to collect from her. On May 8, 1998, the Debtor accepted a proposal for the completion of $10,500.00 worth of work on her residence, including the installation of a fence and a 440 square foot deck. She also signed a contract to have a $5,381.41 hot tub installed in the deck. On June 1, 1998, Debtor arranged for a home equity loan in the amount of $45,000.00, which, according to her bankruptcy schedules, represented all but approximately $10,000.00 of her equity in her home.[7] She used the proceeds to pay for the deck work and to pay some of her unsecured creditors, including First Midwest Bank which was paid $3,102.51, AT&T which was paid $11,613.61 and First USA which was paid "$12,8886.42 [sic]," which apparently should be $12,886.42. These payments made by the Debtor were made to all of the Debtor's unsecured creditors, other than for debts allegedly owed to relatives and the debts incurred in her pursuit of the domestic relations proceedings in Kane County. In mid August 1998, the Debtor quitclaimed her interest in her residence to a land trust which named a bank as trustee and transferred a 50% interest in the residence to her 18 year old daughter.

[7] A "home equity loan" is a consumer loan secured by whatever equity the debtor has in the debtor's home and is not used solely to purchase or construct the home or to refinance a purchase money loan. See Julia Patterson Forrester, Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing, 69 Tul. L. Rev. 373, 377 (1994).

On September 24, 1998, the Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 1301 et seq. On December 15, 1998, the Debtor converted the case to one under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 et. seq. The Plaintiffs timely filed their complaint to determine dischargeability on April 9, 1999, and their amended complaint to determine dischargeability on August 26, 1999. The Debtor subsequently filed the instant motions to dismiss and the motion to strike.

Count I of Plaintiffs' amended complaint seeks a determination that the debt owed to the Plaintiffs for W&B's attorney's fees, costs, interest and Nyuli's attorney's fees is nondischargeable under § 523(a)(6) of the Bankruptcy Code, 11 U.S.C. § 523(a)(6). Additionally, Count I seeks attorney's fees under state law, pursuant to 750 ILCS 5/508(b) for the fees and expenses incurred in the enforcement of the order entered as a result of the Debtor's contempt of court. The Plaintiffs argue that the Debtor knew that as a result of a warning from the court, she would be required to pay Williams' attorney's fees if she were found to be in contempt of court. Nevertheless, despite the fact that she knew it would cause Williams to incur unnecessary legal expenses, the Debtor initiated a proceeding in which she falsely accused him of sexually abusing their child. According to the Plaintiffs, the Debtor's actions after being ordered to pay Williams' legal fees demonstrate a well-conceived and intentional plan to thwart his recovery.

Count III, also brought under § 523(a)(6), seeks a finding that Williams' claim for loss of society, emotional distress and lost wages is nondischargeable. In Count III, Williams also seeks damages for loss of visitation, for emotional distress and for attorney's fees and lost wages, along with punitive damages.

In Count II, the Plaintiffs request that the Debtor's discharge be denied under § 727(a)(2)(A). The Plaintiffs argue that the Debtor knew that she would be required to pay Williams' attorney's fees after being found in contempt of court. The Plaintiffs claim that the Debtor's reduction in home equity for non-essentials, the transfer of her home into a trust and the transfer of 50% of the beneficial interest in her home to her daughter were all for the purpose of hindering and delaying the Plaintiffs from collecting the judgment they had against her.

Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §1334(b) as a matter arising under §§ 523 and 727 of the Bankruptcy Code. The matter is before this Court under Internal Operating Procedure 15(a) (formerly known as Local Rule 2.33) of the United States District Court for the Northern District of Illinois, automatically referring bankruptcy cases and proceedings to this court for hearing and determination. This is a core proceeding under 28 U.S.C. §157(b)(2)(I) and (J).

Standards for dismissal

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). A complaint will be dismissed if it appears from the complaint that the plaintiffs cannot prove a set of facts that would enable them to

recover on the allegations of their complaint. McKown v. Dun & Bradstreet, Inc., 744 F.Supp. 1046, 1047 (D. Kan. 1990) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)). Both the facts alleged in the complaint and reasonable inferences drawn from these facts are considered in the light most favorable to the plaintiff. Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir. 1986), cert. denied, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed. 2d 676 (1987).

Discussion

I. Motion to quash summons and dismiss the amended complaint pursuant to Fed.R.Bankr.P. 7004(e)

Fed.R.Bankr.P. 7004(e), dealing with the time limit for service within the United States, requires that service be made by delivery of the summons and complaint within 10 days after the summons is issued. Here, the amended complaint was filed, and alias summons issued on August 26, 1999. In fact, the Debtor admits that both were delivered to her on September 7, 1999. However, she argues that the service was not made within 10 days of the issuance of the alias summons as required, and that, therefore, the alias summons should be quashed and the amended complaint dismissed.

It is true that the alias summons and amended complaint were not delivered to Debtor until twelve days after the issuance of the alias summons. Nevertheless, the delivery was still timely. According to

Fed.R.Bankr.P. 9006(a), when computing a period of time prescribed by the Rules, the day of the event from which the period of time begins to run is not included. Therefore, August 26 is not included in the computation of the ten day period. Fed.R.Bankr.P. 9006(a) further states that the last day of a time period shall be included unless it is a Saturday, Sunday or legal holiday. Here, the tenth day fell on September 5, 1999, which was a Sunday.[8] Because Sunday is not included in computing the ten day period, the end of the time period fell on September 6, 1999. However, September 6, 1999 was Labor Day, which is one of the legal holidays listed in Rule 9006(a). Therefore, the time period for the Plaintiffs to serve the Debtor with the summons and complaint included September 7, 1999, the day on which delivery of both was made to her. Thus the Debtor received the complaint and summons in a timely manner and her motion to dismiss on this ground is denied.

II. Motion to dismiss the amended complaint pursuant to Fed.R.Civ.P. 7004(m)

Fed.R.Civ.P. 4(m), incorporated by Bankruptcy Rule 7004(a) states, "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time. . . ." The Debtor argues that the summons and amended complaint have not been served

within 120 days of the filing of the complaint. This is an interesting argument, since, as discussed above, in her first motion to dismiss, the Debtor stated that the summons and amended complaint were delivered

[8] The court may take judicial notice of the dates and days of the week. See, e.g., Plotner v. AT&T Corp., 224 F.3d 1161, 1167 n.1 (10th Cir. 2000).

to her on September 7, 1999, far less than 120 days from the date the complaint was filed, August 26, 1999. Therefore, the Debtor's motion to dismiss pursuant to Fed.R.Civ.P. 4(m) is denied.

III. Motion to dismiss the amended complaint pursuant to Fed.R.Civ.P. 7012(b)(3)

Fed.R.Civ.P. 7012(b)(3), made applicable to these proceedings by Fed.R.Bankr.P. 7012(b), allows the defense of improper venue to be raised by motion. The Debtor claims that The Plaintiffs did not raise any allegations regarding venue in the adversary complaint, and that this Court is not the proper venue. The argument that this Court is not the proper venue is without merit. When a bankruptcy case is pending, the district court in which the case is pending is the proper venue for any proceeding arising under Title 11.[9] 10 Collier on Bankruptcy ¶ 7012.04[2] at p. 7012-12 (Lawrence P. King 15th ed. 1997). Therefore, this Court is the proper venue for this proceeding arising under Title 11 and the Debtor's motion to dismiss on this ground is denied.

IV. Motion to dismiss the amended complaint pursuant to Fed.R.Civ.P. 12(b)(4) and 12(b)(5)

Fed.R.Civ.P. 12(b)(4) and (5) are made applicable to this proceeding by Fed.R.Bankr.P. 7012(b). Fed.R.Civ.P. 12(b)(4) provides that a defense of insufficiency of process may be made by motion, and Fed.R.Civ.P. 12(b)(5) provides that a defense of insufficiency of service of process may be made by motion. The Debtor alleges that the alias summons and amended complaint are insufficient because they fail to state whether attorneys Edith Brown and Janet Watson are counsel for W&B, whether

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[9] There are two exceptions under the bankruptcy rules, neither of which are relevant here. The first involves *de minimis* claims, which must be filed in the district where the defendant resides. The second involves claims brought by the trustee and arising after the commencement of the case, relating to certain business operations of the debtor.

one or both of them represent Williams or whether Williams represents himself. The Debtor's arguments here are without merit. On the final page of the amended complaint, the names of both Edith Brown and Janet Watson are listed. Under each name appear the words "Attorney for Daniel L. Williams, Jr. and Watson & Brown, P.C." Clearly, attorneys Brown and Watson represent both Williams and W&B. There is nothing unclear or unusual about who is representing whom, and, therefore, the Debtor's motion to dismiss on this ground is denied.

V. Motion to strike immaterial allegations pursuant to Fed.R.Civ.P. 12(f)

Fed.R.Bankr.P. 7012(b) incorporates by reference subdivision (f) of Fed.R.Civ.P. 12, which provides, "Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Generally, such motions to strike are not favored by the courts because they often are a product of dilatory tactics. In fact, inclusion of the material usually would not prejudice the movant. 10 Collier on Bankruptcy ¶ 7012.08 at p. 7012-19 (Lawrence P. King ed. 1997).

The Debtor seeks to have stricken from Plaintiffs' amended complaint as immaterial, impertinent or incorrect the Plaintiffs' request for attorney's fees and interest in Count I and Plaintiffs' request for attorney's fees and punitive damages in Count II. The Debtor argues that the Plaintiffs are not entitled to attorneys' fees, interest on an unsecured claim or punitive damages under § 523(a)(6) of the Bankruptcy Code.

In Count I, the Plaintiffs request the attorney's fees necessary to collect the judgment awarded them by the Kane County Circuit Court, and attorney's fees pursuant to 750 ILCS 5/508(b) for the enforcement

of the contempt order entered by that court. The Debtor's argument that the Plaintiffs are not entitled to attorney's fees under § 523(a)(6) misses the point in this proceeding where the Plaintiffs' request for attorney's fees is based on state law. The Plaintiffs' request is for attorney's fees under 750 ILCS 5/508(b), not § 523(a)(6). Plaintiffs also request attorney's fees necessary to collect the amounts determined to be nondischargeable under § 523(a)(6). It is true that nothing in 11 U.S.C. § 523(a)(6) itself indicates that the prevailing party may be awarded attorney's fees. See America First Credit Union v. Gagle (In re Gagle), 230 B.R. 174, 185 (Bankr. D. Utah 1999). However, it is not clear that the Plaintiffs will be able to recover fees in this proceeding under any theory and therefore, it is not necessary to strike this request. Even if the Plaintiffs are eventually found not to be entitled to recover attorney's fees, inclusion of this request has not been shown to prejudice the Debtor, and a determination of entitlement to fees is premature at this time.

The Debtor also seeks to have this Court strike the Plaintiffs' request that this Court award interest on the amount awarded by the Kane County Circuit Court. It is not yet clear which side, if either, may be entitled to prejudgment interest. Some bankruptcy courts have seen it fit to award prejudgment interest as compensation for the loss of the use of a creditor's money from the date the claim accrued until the entry of judgment, while other bankruptcy courts have not been willing to award prejudgment interest. See, e.g., Sunclipse, Inc. v. Butcher (In re Butcher), 200 B.R. 675, 680 (Bankr. C.D. Cal. 1996)(awarding prejudgment interest). But see Shannon v. Russell (In re Russell), 203 B.R. 303, 317 (Bankr. S.D. Cal. 1996)(declining to award prejudgment interest). Nothing the Plaintiffs have pled suggests that there is anything scandalous, impertinent, or otherwise untoward about the Plaintiffs' complaint with respect to

prejudgment interest that would justify a motion to strike under Fed.R.Civ.P. 12(f). Therefore, the Debtor's motion to strike the Plaintiffs' request for interest is denied.

Finally, the Debtor requests that the Plaintiffs' demand for attorney's fees and punitive damages in Count II be stricken. Since the Plaintiffs do not in fact request attorney's fees or punitive damages in Count II, this motion to strike is denied.

VI. Motion to dismiss amended complaint pursuant to Fed.R.Bankr.P. 7010(b)

Fed.R.Bankr.P. 7010(b) provides that Fed.R.Civ.P. 10 applies in adversary proceedings. Fed.R.Civ.P. 10(b) provides, "All averments of claim . . . shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. . . ." The Debtor argues that the amended complaint should be dismissed because the Plaintiffs fail to arrange their causes of action into separate counts.[10] The Plaintiffs assert two causes of action, one seeking to have a debt that the Debtor owes for fees and costs incurred in the state court action deemed to be nondischargeable under § 523(a)(6) and one seeking to deny the Debtor a discharge of all of the Debtor's debts under § 727(a)(2)(A). The Plaintiffs allegedly assert two causes of action, under § 523(a)(6) and § 727(a)(2)(A) but their amended complaint contains three counts. The Debtor claims that the Plaintiffs' alleged failure to set forth the separate counts interferes with a clear analysis of the matters set forth in the Plaintiffs' complaint.

[10] The Debtor's motion in this regard deals only with Counts I and III of the amended complaint.

This Court disagrees and instead concludes that in Count I, the Plaintiffs have pled a cause of action under § 523(a)(6), based upon willful and malicious conduct of the Debtor in connection with the judgment awarded by the Circuit Court of Kane County. In Count III, the Plaintiffs set forth an alleged cause of action, also under § 523(a)(6). However, the cause of action set forth in Count III is different from that asserted in Count I. It is based upon the Debtor's intentional interference with Williams' parent/child relationship with Ashanti. While it may have been technically correct for the Plaintiffs to plead their Counts I and III as one count because both are brought under § 523(a)(6), the two counts seek relief based on different facts and different legal theories. In any event, the pleading of Count I and Count III as two separate counts does not make the basis of each count's claim for relief unclear or otherwise confuse the reader. Both Counts clearly set forth a claim for relief which is clearly pled as to the prayer for relief. Because this Court finds that the Plaintiffs' causes of action are clearly set forth in separate counts, the Debtor's motion to dismiss the amended complaint on this ground is denied.[11]

VII. Motion to dismiss Count I because Plaintiffs lack standing

The Debtor argues that Count I should be dismissed because the Plaintiffs lack standing to bring an action on behalf of Nyuli. The Debtor appears to be under the misguided impression that because the Plaintiffs seek to recover $4,464.88 for Nyuli's attorney's fees incurred while acting as Guardian ad Litem, they are bringing an action on behalf of Nyuli. This is not the case. Williams is seeking to have the Debtor pay Nyuli's attorney's fees because, to the extent that Debtor does not pay them, Williams will be required

[11] Because this Court finds that Plaintiffs's complaint is properly pled, the Debtor's motion to dismiss Count III for being improperly pled because it is duplicative of Count I is also denied.

to pay them. Williams is not bringing an action on behalf of Nyuli. Rather, he is bringing the action for fees on his own behalf. Therefore, the Debtor's motion to dismiss for lack of standing is denied.

VIII. The motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted

Under Fed.R.Civ.P. 12(b)(6), made applicable to bankruptcy proceedings by Fed.R.Bankr.P. 7012, dismissal of a complaint is appropriate if the complaint fails to state a claim upon which relief can be granted, and the moving party is entitled to judgment as a matter of law. Conley v. Gibson, 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). On a Rule 12(b) motion, the plaintiff's allegations must be taken as true, and must be viewed, along with all reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff. Redfield v. Continental Cas. Corp., 818 F.2d 596, 606-07 (7th Cir. 1987). The plaintiff has failed to state a claim upon which relief can be granted if the complaint does not adequately plead some theory upon which the plaintiff could recover. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); see also Knopfler v. Addison Bldg. Material Co., Inc. (In re Germansen Decorating, Inc.), 149 B.R. 522, 526 (Bankr. N.D. Ill. 1993).

A. Count I and Count III

Count I of the amended complaint asserts that the Debtor's debt owed to the Plaintiffs stemming from the Kane County proceedings should be found nondischargeable because the Debtor instituted a proceeding in which she intentionally and falsely accused Williams of sexual abuse, knowing that this would cause him to incur legal expenses, and that W&B would spend vast amounts of time representing Williams in a groundless proceeding. Count I of the amended complaint also alleges that, after entry of the order

finding the Debtor in contempt, she immediately began taking steps to make the Plaintiffs' ability to collect the judgment more difficult by transferring much of her property to others and paying off selected unsecured creditors. The Plaintiffs claim that this conduct was part of a well-conceived, intentional plan designed to frustrate Williams' attempt to recover the money due him under the Circuit Court order. Count III of the amended complaint reiterates the facts recited above and concludes that as a result of the Debtor's false allegations and testimony and interference with Williams' relationship with Ashanti, Williams suffered emotional distress and financial loss in the form of legal fees and lost wages.

In order to entitle the Plaintiffs to a finding of nondischargeability under 11 U.S.C. § 523(a)(6), the Plaintiffs must plead and ultimately prove by a preponderance of the evidence three elements: (1) that the Debtor caused an injury; (2) that the Debtor's actions were willful; and (3) that the Debtor's actions were malicious. A.V. Reilly Int'l, Ltd. v. Rosenzweig (In re Rosenzweig), 1999 WL 569446 *12 (Bankr. N.D. Ill. 1999) (citing French, Kezelis & Kominiarek, P.C. v. Carlson (In re Carlson)), 224 B.R. 659, 663 (Bankr. N.D. Ill. 1998).

The Plaintiffs have pled sufficient facts to entitle them to go forward in seeking a determination of dischargeability under 11 U.S.C. § 523(a)(6). Williams claims that the Debtor injured him by causing him to incur substantial legal expenses while defending against her baseless lawsuit, and by causing him to suffer emotional distress. W&B alleges that the Debtor injured it by causing its attorneys to spend vast amounts of time and money in its defense of Williams, for which it has not yet been paid. Both Williams and W&B claim that they were further injured when the Debtor allegedly transferred assets shortly prior to filing her petition for bankruptcy, thereby attempting to place those assets beyond the Plaintiffs' reach.

The Plaintiffs have also asserted that the Debtor's acts were "willful." Willful is defined as deliberate or intentional. French, Kezelis & Kominiarek, P.C. v. Carlson (In re Carlson), 224 B.R. 659, 662 (Bankr. N.D. Ill. 1998) (citing In re Arlington, 192 B.R. 494, 500 (Bankr. N.D. Ill. 1996)). The United States Supreme Court has held that, in a § 523(a)(6) action, "willful" modifies "injury," indicating that nondischargeability under that section requires proof of a deliberate or intentional injury, not merely a deliberate or intentional act that leads to an injury. Carlson, 224 B.R. at 662 (citing Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)). Willfulness, under the Geiger standard, has been found where a Debtor filed a lawsuit without having a factual basis for the claim and thereby caused another to incur substantial attorney's fees in defending himself. Carlson, 224 B.R. at 662 (citing In re Arlington, 192 B.R. 494, 500 (Bankr. N.D. Ill. 1996)). In Carlson, the debtor's acts were found to be willful because the Debtor necessarily knew and intended that the plaintiff's law firm would incur expenses in defending the lawsuit, particularly because the debtor filed the suit to get back at the plaintiff for defeating him in an earlier case. Carlson, 224 B.R. at 662.

Here, the Plaintiffs have alleged that the Debtor knew that the Plaintiffs would incur legal expenses in defending the lawsuit, and that the Plaintiffs' recovery of the state court damages would be hindered by the Debtor's transfer of assets prior to filing bankruptcy. The Plaintiffs also allege that the Debtor knew that she would be ordered to pay Williams' attorneys if she were found in contempt of court, and she engaged in a course of conduct which resulted in her being found in contempt. Like the Carlson case, where the finding of intent was enhanced because the debtor filed suit in an attempt to "get back at" the

plaintiff, here the finding of intent is enhanced because the Debtor, as found by the divorce court, filed suit as part of a systematic effort to undermine Williams' relationship with his daughter.

Finally, the Plaintiffs have alleged that the Debtor's acts were malicious. Maliciousness does not require ill will or a specific intent to do harm; behavior is malicious if it is wrongful and without just cause or excuse. Carlson, 224 B.R. at 662. The allegation that Debtor filed a lawsuit intending to interfere with Williams' parent/child relationship with his daughter, and that she transferred assets intending to frustrate the Plaintiffs' ability to collect the damages awarded to her fits the definition of malice as a wrongful act without just cause or excuse.

Thus, with respect to Counts I and III, the Plaintiffs have stated a claim upon which relief can be granted.

B. Count II

Count II of the amended complaint asserts that the Debtor should be denied a discharge under 11 U.S.C. § 727(a)(2)(A) because, within one year of the bankruptcy, she took out a home equity loan representing all but approximately $10,000.00 of the equity in her home, paid several unsecured creditors in full, quitclaimed her interest in her residence, and transferred a 50% beneficial interest in her residence to her 18 year old daughter.[12]

Section 727(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 727(a)(2)(A) provides:

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[12] Additionally, in Count II, the Plaintiffs assert that the unsecured debt paid with proceeds of the home equity loan represented all of Debtor's unsecured debt other than an alleged debt owed to relatives and the debt owed to the Plaintiffs. The Plaintiffs further allege that these actions were done for the purpose of hindering them from collecting a judgment entered in their favor by the Circuit Court of Kane County, Illinois.

> (a) The court shall grant the debtor a discharge, unless --
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –
> (A) property of the debtor, within one year before the date of the filing of the petition[.]

Thus, to state a claim under 11 U.S.C. § 727(a)(2)(A), the Plaintiffs must allege that the debtor: (1) transferred, destroyed or concealed property; (2) belonging to the debtor; (3) within one year of filing bankruptcy; (4) with the intent to hinder, delay or defraud a creditor or officer of the estate. Illinois v. Volpert (In re Volpert), 175 B.R. 247, 263 (Bankr. N.D. Ill. 1994).

The Plaintiffs have alleged that there was a transfer of property here. Under the Bankruptcy Code, transfer is broadly defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption[.]" 11 U.S.C. § 101(54). See also Barnhill v. Johnson, 503 U.S. 393, 397, 112. S.Ct. 1386, 1389, 118 L.Ed. 2d 39 (1992). If, as Plaintiffs allege, the Debtor took out a home equity loan on June 1, 1998, she transferred property as required by §727(a)(2)(A). Also, she allegedly quitclaimed her interest in her residence to a land trust and transferred a 50% interest in her residence to her daughter. There is no doubt that these transactions were "transfers" as that term is used in

§ 727(a)(2)(A). The transfer took place on or about June 1, 1998, which is well within one year before the September 24, 1998 Chapter 13 petition.

Thus, the question becomes whether the Debtor entered into the home equity loan with the intent to hinder, delay, or defraud her creditors. The short answer is it is hard to come up with any other reason for her to make what amounts to a gift of one-half the equity in her home to her daughter other than a transparent attempt to place the property beyond the reach of her creditors. See Smiley v. First Nat'l Bank of Belleville (In re Smiley), 864 F.2d 562, 568 (7th Cir. 1989); see also First Texas Savings Assn., Inc. v. Reed (In re Reed), 700 F.2d 986 (5th Cir. 1983).

Thus the Plaintiffs have stated a claim with respect to Count II upon which relief can be granted.

Conclusion

For the foregoing reasons, the Debtor's motion to strike and dismiss is denied. The Debtor shall have until August 9, 2001 to answer the amended complaint. A status hearing on the amended complaint is set for August 22, 2001 at 10:00 a.m.

ENTERED:

Dated: July 19, 2001

Robert E. Ginsberg
United States Bankruptcy Judge